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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

EX PARTE PRESENTATION

EX PARTE OR LATE FILED

Re: Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128; Impact of Carrier Bankruptcies on Interim and Intermediate Period True-Ups

Dear Ms. Dortch:

APCC has demonstrated that the Commission must consider the impact of the WorldCom and Global Crossing bankruptcies on a true-up for the Interim Period (November 7, 1996 - October 6, 1997) and Intermediate Period (October 7, 1997 - April 21, 1999). As a result of the bankruptcies, the contemplated true-up will not ensure fair compensation of independent payphone service providers ("PSPs") - it will only aggravate their existing compensation deficit. Therefore, the true-up must be modified to prevent that result. APCC, *ex parte* letter, Impact of IXC Bankruptcies on a True-Up, September 11, 2002, at 6 ("APCC Bankruptcy *Ex Parte*").

As explained in the attached memorandum, the interexchange carriers' ("IXCs") contrary arguments have no merit. First, there is no procedural barrier to consideration of the IXC bankruptcies, as required by *West Ohio Gas Co. v. Public Util. Comm'n*, 294 U.S. 79 (1935). None of the affected decisions is final. There is no basis for refusing to consider such critical new facts.

Second, Section 276 does not prohibit - rather it *requires* - modification of the true-up to take account of the bankruptcies. Section 276 does not require a particular allocation of payments among IXCs. Nor does it require or permit the Commission to allocate "equivalent" shares of the "fair" compensation payment to IXCs that it knows cannot pay those shares. Deliberately reducing PSPs' compensation below the "fair" level, especially for such a pointless purpose, violates the statutory command to ensure that "all *payphone service providers* are fairly compensated for each and every call." 47 U.S.C. § 276(b)(1)(A)(emphasis added).

Finally, there is absolutely no factual basis for presuming that bankrupt IXCs will pay any significant portion of the compensation they owe. If the Commission believes it necessary to project the amounts that might conceivably be paid, at some unknown future time, by the bankrupt IXCs, the Commission should first determine the market value of the IXCs' unsecured debt. With WorldCom's bonds at 11.75 cents on the dollar, and Global Crossing bonds at virtually zero, the currently contemplated true-up would not bring independent PSPs' Interim Period compensation anywhere near the level currently deemed fair.

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Sincerely,

A handwritten signature in black ink, appearing to read "Robert F. Aldrich". The signature is fluid and cursive, with the first name "Robert" being more prominent.

Albert H. Kramer
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American Public Communications Council

Docket No. 96-128

Payphone Compensation True-Up

**REPLY TO THE IXC's POSITION THAT THE COMMISSION
SHOULD NOT CONSIDER THE IMPACT OF IXC BANKRUPTCIES**

The American Public Communications Council ("APCC") has demonstrated that the Commission must consider the impact of the WorldCom and Global Crossing bankruptcies on a true-up for the Interim Period (November 7, 1996 - October 6, 1997) and Intermediate Period (October 7, 1997 - April 21, 1999). As a result of the bankruptcies, the contemplated true-up will not ensure fair compensation of independent payphone service providers ("PSPs") - it will only aggravate their existing compensation deficit. Therefore, the true-up must be modified to prevent that result. APCC, *ex parte* letter, Impact of IXC Bankruptcies on a True-Up, September 11, 2002, at 6 ("APCC Bankruptcy *Ex Parte*").

The interexchange carriers ("IXCs") make three arguments in response. See AT&T, WorldCom, and Sprint, joint *ex parte* letter dated October 1, 2002 ("Joint IXC Refund *Ex Parte*").¹ First, the IXCs deny that the Commission is required to consider the IXC bankruptcies at all. Joint IXC Refund *Ex Parte* at 11. Second, the IXCs argue that modifying the true-up to take account of the bankruptcies would cause some IXCs to bear the costs associated with other IXCs, and would thereby conflict with *Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) ("*Illinois*"). *Id.* at 9-10. Third, the IXCs argue that, in any event, the impact of the bankruptcies is uncertain. *Id.* at 10-11. None of these arguments has merit.

**I. THE CASE LAW DOES NOT PERMIT THE FCC TO IGNORE THE
BANKRUPTCIES**

The IXCs do not dispute that, under the Supreme Court's decision in *West Ohio Gas Co. v. Public Util. Comm'n*, 294 U.S. 79 (1935), when an agency is prescribing a rate for a past period, it must consider material facts that have occurred during or after the period in question." APCC Bankruptcy *Ex Parte* at 7. The IXCs argue, however, that the principle does not apply here because the Commission ordered Intermediate Period refunds before the bankruptcies occurred. This is nonsense. The *Third Payphone Order*² is not final.

¹ The 12-page Joint IXC Refund *Ex Parte* tries to address a number of issues in this complex proceeding. APCC intends to respond separately to each issue addressed.

² *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, and Order on (footnote continued on next page)

There is a pending petition for reconsideration. The Commission has not yet even tried to weigh the equities for and against a true-up for the Intermediate Period. And there has been no determination, final or not, of IXC payments for the Interim Period, which are directly affected by the bankruptcy, and which in turn affect the fairness of the Commission's Intermediate Period decision. The IXCs' argument provides no basis for avoiding consideration of critical new facts.

II. SECTION 276 DOES NOT PROHIBIT THE COMMISSION FROM CONSIDERING THE BANKRUPTCIES

According to the IXCs, the Commission cannot modify the planned true-up to take account of the IXC bankruptcies because "the D.C. Circuit has already made clear that Section 276 does not authorize the Commission to require some IXCs to bear costs associated with other IXCs." Joint IXC Refund *Ex Parte* at 9, *citing Illinois*. But that is not what the court said, and that is not what is at issue here. The court concluded only that the Commission "did not adequately justify" the allocation of payments based on toll revenues and the exemption of small IXCs from paying compensation. *Id.* at 565. The court found that the Commission's rationale of "administrative convenience" lacked support in the factual record or the purposes of Section 276. *Id.* In this true-up proceeding, however, the facts are different. Taking account of the IXC bankruptcies is not only justified, but *compelled* by the facts and the overriding statutory objective "to promote the widespread deployment of payphone services" by ensuring that "*all payphone service providers* are fairly compensated for each and every call." 47 U.S.C. § 276(b)(1)(A)(emphasis added). Section 276 does not require allocation of payments to IXCs who are unable to pay.³ Nor does it permit the FCC, in a retroactive, equity-bound determination, to reduce PSPs' actual compensation below the "fair" level, solely to ensure that IXCs who can't pay are allocated the same theoretical payment as those who can.⁴

Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 (1999) ("*Third Payphone Order*").

³ It is far more rational to allocate the total payment among IXCs who *can* pay, than to insist on a fictional "equal" per-call allocation of payment shares to carriers who *can't* pay.

⁴ The IXCs also assert that "IXCs such as AT&T and Sprint are not guarantors of the PSP industry." *Id.* at 10. The IXCs miss the point. APCC does not claim that Section 276 gives PSPs a right to full recovery. Rather, APCC contends that Section 276 does not permit the Commission to take action that *guarantees that PSPs will under-recover* their costs. Commission action that ensures that independent PSPs will under-recover cannot possibly be consistent with Section 276's requirement that the Commission "ensure" that PSPs are fairly compensated.

Disregarding the bankruptcies also offends equity. Independent PSPs have not recovered their costs (as determined by the FCC) for the Interim *or* the Intermediate Period. Due to the bankruptcies, a true-up would reduce independent PSPs' compensation even further below the "fair" level. Pushing undercompensated PSPs further "under water" does not help to "make the parties whole."

Furthermore, retroactive refunds are not even needed to make IXC's whole. The IXC's have already recovered their compensation costs from their customers. *See* APCC, *ex parte* letters re Standards for Granting Retroactive True-Ups, April 15, 2002, at 9-12; APCC, *ex parte* letter re IXC Over-Recovery of Compensation Payments, September 23, 2002. In fact, they have received windfalls by *over*-recovering their compensation payments. *Id.* They received additional windfalls when they avoided the payments authorized by the Act for subscriber 800 calls during the Early Period. *See, e.g.*, APCC, *ex parte* letter, Early Period Compensation, April 15, 2002; APCC *ex parte* letter, May 23, 2002.

III. INDEPENDENT PSPS ARE GUARANTEED TO BE UNDER-COMPENSATED IF THE COMMISSION ORDERS A TRUE-UP FOR BOTH PERIODS

The IXC's also challenge APCC's assertion that independent PSPs are guaranteed to be undercompensated if the Commission orders a true-up for the Intermediate Period. First, the IXC's claim that APCC "inaccurately portrays the potential impact of the WorldCom and Global Crossing bankruptcies" (Joint IXC Refund *Ex Parte* at 10) by assuming that WorldCom will not offset its Intermediate Period refunds against its additional Interim Period payments. *Id.* In fact, APCC assumed the opposite. As APCC's *ex parte* clearly stated, independent PSPs would be massively under-compensated *even if* WorldCom's Intermediate Period refunds are offset against its Interim Period obligations. APCC Bankruptcy *Ex Parte* at 2, n.3. That is true because the amount of money that WorldCom would owe independent PSPs for the Interim Period exceeds by a *wide margin* the amount of money that independent PSPs owe WorldCom for the Intermediate Period. *Id.*; APCC, *ex parte* letter and table, "Possible True-Up Outcomes for PSPs and IXC's" (revised), September 19, 2002 ("APCC Revised True-Up Outcomes Table"). *See also* APCC, *ex parte* letter, Allocation of IXC Shares, May 23, 2002 at 5-6.⁵ The same is true for Global Crossing. *Id.* Thus, even if the bankrupt IXC's must offset their refunds against

⁵ The IXC's assert that "while [WorldCom] expects to be a net payer [in a true-up for the Interim and Intermediate Periods], its credits from PSPs will nearly balance WorldCom's liabilities to PSPs." Joint IXC Refund *Ex Parte* at 10. The Commission should not accord this assertion any weight. WorldCom provides absolutely no explanation or documentation to support this assertion.

their back payments, independent PSPs still come out of a true-up for both periods more than \$25 million short of full recovery. See APCC Revised True-Up Outcomes Table.

Second, the IXC's argue that it is incorrect to presume that WorldCom's back payments for the Interim Period will go unpaid. Joint IXC Refund *Ex Parte* at 10-11. However, no business in the real world acts on the assumption that a bankrupt entity will pay its debts (especially unsecured debts). Therefore, it would be patently unreasonable for the Commission to act on such an assumption.

The Commission should be especially leery of such assumptions in light of past experience with reorganizations of telecommunications firms. Creditors generally have come away from telecommunications bankruptcies with very little compensation. And in WorldCom's case, it has yet to be determined whether the company will emerge from Chapter 11 or end up in Chapter 7.⁶

If the Commission believes it necessary to forecast to what extent independent PSPs might be compensated by the bankrupt IXC's, the most reasonable approach would begin by determining what value the financial markets place on unsecured WorldCom and Global Crossing debt. That value is the most PSPs could reasonably expect to receive in a true-up for the Interim Period. As of September 23, 2002, the market value of unsecured WorldCom bonds was 11.75 cents on the dollar, and the market value of unsecured Global Crossing bonds was virtually zero – 1.25 cents on the dollar. See Attachment 1 ("Dow Jones High Yield, Bankrupt Bond Price Indications").⁷ Accordingly, independent PSPs could not reasonably expect to collect more than 11.75% of WorldCom's Interim Period underpayment, and could not reasonably expect to collect anything from Global Crossing.⁸

⁶ Moreover, because of the on-going bankruptcy proceedings, independent PSPs would have to wait for an indefinite period to collect whatever fractional payment they might recover from WorldCom and Global Crossing. In the mean time, pursuant to the true-up, independent PSPs will be forced to pay refunds to other IXC's, causing independent PSPs extreme financial stress. Indeed, many PSPs are certain to go bankrupt before ever seeing a dime from the bankrupt IXC's (assuming that the bankrupt IXC's have any money at all to pay independent PSPs).

⁷ The value of a bankrupt IXC's obligation to pay independent PSPs pursuant to a true-up would actually be significantly less than that of unsecured bonds, since there is likely to be a significant amount of litigation and additional uncertainty surrounding the amount that bankrupt IXC's owe independent PSPs. Generally, no uncertainty regarding the amount owed surrounds a company's obligation to pay its bonds. As APCC is informed, the value of unsecured debt other than bonds is frequently only half the market value of an equivalent bond.

⁸ Incredibly, the IXC's suggest that independent PSPs' claims against WorldCom might end up being worth more with WorldCom in bankruptcy than if WorldCom had never entered bankruptcy at all. Joint IXC Refund *Ex Parte* at 10. This is pure fantasy. The Commission should base its policy on market realities, not extremely remote possibilities. If AT&T and Sprint are so confident of the value of unsecured WorldCom (footnote continued on next page)

Applying the 11.75% figure to WorldCom's additional Interim Period compensation payments would not bring independent PSPs' Interim Period compensation significantly closer to the fair level of \$.229 per call.⁹

In summary, the slight possibility that independent PSPs might eventually collect a fraction of the back compensation that WorldCom and Global Crossing would owe is small comfort to independent PSPs. The maximum recovery that reasonably could be expected from these bankrupt IXCs would still leave independent PSPs massively undercompensated for dial-around calls.

Therefore, the contemplated true-up for these two periods must be modified to take account of the IXC bankruptcies. Otherwise, contrary to the statutory requirement, it would ensure that independent PSPs are *unfairly* compensated for dial-around calls. 47 U.S.C. § 276(b)(1)(A); *See Bankruptcy Ex Parte*.

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debt, AT&T and Sprint can demonstrate this confidence to the Commission by offering to buy independent PSPs' claims against WorldCom.

⁹ Assuming that WorldCom, in a true-up, pays independent PSPs 11.75% of the compensation that it owes PSPs for the Interim Period, independent PSPs would still be compensated for the Interim Period at an average rate of only about \$.167 per call. This is only slightly better than the \$.161 per call that independent PSPs would be paid for the Interim Period if WorldCom paid PSPs nothing at all in a true-up. *See Bankruptcy Ex Parte* at 4. These per-call rates were calculated with the data provided in the attachments to Allocation of IXC Shares, *Ex Parte* Letter to Marlene H. Dortch, Secretary, FCC, from Albert H. Kramer, Robert F. Aldrich and Robert N. Felgar at 9 (May 23, 2002). *See Bankruptcy Ex Parte* at 4.

ATTACHMENT 1

HIGH YIELD, BANKRUPT BOND PRICE INDICATIONS

-- =DJ CFA Active HY, Bankrupt Bond Price Indications For 9/23 --

HIGH YIELD, BANKRUPT BOND PRICE INDICATIONS 9/23/02

The following table of high yield and bankrupt company bond price indications represents issues active in the above noted trading day's market.

N/A indicates that pricing wasn't available. Companies in Chapter 11 bankruptcy are denoted with an asterisk. Please call Dow Jones Corporate Filings Alert at (202)628-7669 about these prices.

ISSUER	DESCRIPTION	BID	CLOSING
		CHANGE	
*Adelphia Commun	9.375% Nts-09	36.625	-1.250
Advantica Rest.	11.25% Nts-08	75.625	-0.250
AES Corp	8% Nts-08	51.250	-1.375
*Budget	9.125% Nts-06	17.875	---
Charter Commun	8.625% Nts-09	64.625	-2.125
*Comdisco	6.125% Nts-03	85.000	-0.625
Conseco Inc	9% Nts-06	12.625	---
D.R. Horton	10% Nts-06	101.375	-0.125
Dillard's	7.375% Nts-06	97.500	---
Dynegy	8.125% Nts-05	39.500	-0.875
*E.spire Commun	13% Nts-05	N/A	
*Enron Corp	6.625% Nts-05	12.750	-0.125
*Enron Corp	9.125% Nts-03	12.750	-0.125
*Exide Tech	10% Nts-05	13.750	---
*Fitzgerald Gaming	12.25% Nts-04	6.625	---
*Flag Telecom	11.625%-10	40.000	0.750
*Formica	10.875% Nts-09	26.750	---
*Galey & Lord	9.125% Nts-08	16.375	---
*Global Crossing	9.625% Nts-08	1.250	---
*Globalstar Commun.	11.25% Nts-04	2.750	---
*Grace WR	8% Nts-04	29.625	---
*ICG Commun	0/9.875% Nts-08	0.625	---
*ICG Commun	0/13.5% Nts-05	0.375	---
*Impsat Fiber	12.375% Nts-08	1.750	---
Isle of Capri	8.75% Nts-09	102.375	-0.250
*Kaiser Aluminum	10.875% Nts-06	68.750	-0.625
Kaufman & Broad	9.5% Nts-11	102.250	-0.375
*Kmart Corp	9.375% Nts-06	17.250	-2.375
Level 3 Commun	9.125% Nts-08	53.000	-0.250
*Lodgian	12.25% Nts-09	52.750	---
Lyondell Chem	9.625% Nts-07	96.000	-0.625
*Metrocall	10.375% Nts-07	0.625	---
*Metromedia Fiber	10% Nts-08	0.375	-0.250
*National Steel	9.875% Nts-09	34.375	-0.500

Nextel	0/10.65% Nts-07	82.750	-0.750
*NTL Inc.	10% Nts-07	13.625	-0.500
Oregon Steel	10% Nts-09	101.625	-0.875
*Plainwell	11% Nts-08	0.625	---
*Polaroid	7.25% Nts-07	5.875	---
*Polymer Group	9% Nts-07	20.375	---
*PSINet	11.5% Nts-08	9.625	---
Qwest	7.75% Nts-06	54.750	-1.750
*Reliance Group	9.75% Nts-03	2.625	---
Trump Castle	11.75% Nts-03	91.625	-1.125
*U.S. Air	10.375% Nts-13	26.625	---
United Airlines	9.125% Nts-12	15.750	---
*USG	8.5% Nts-05	80.375	---
Williams Cos.	8.125% Nts-12	68.750	-1.000
*Williams Commun	11.875% Nts-10	8.625	-0.750
*World Access	13.25% Nts-08	4.500	---
*Worldcom	8.25% Nts-10	11.750	-0.250
Xerox	7.2% Nts-12	63.625	---
*XO Commun	10.75% Nts-08	0.375	---

Source: High Yield Advantage, (617) 261-9700